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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOVANNY HERNANDEZ, Defendant and Appellant.	B213336 (Los Angeles County Super. Ct. No. LA055515)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Latin, Judge. Affirmed.

Seymour I. Amster for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael Johnson and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jovanny Hernandez appeals from the judgment entered following his convictions by jury on count 1 – first degree murder (Pen. Code, § 187) with personal firearm use (Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), personal and intentional discharge of a firearm causing great bodily injury and death (Pen. Code, § 12022.53, subd. (d)), and on count 2 – evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a)). The court sentenced appellant to prison for 50 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on April 15, 2007, Christian Soto went to the apartment of appellant and appellant's brother, codefendant Jose Hernandez (Jose).[1] Appellant and Jose were there. Soto had known both for about 10 years. While Soto, appellant, and Jose were in the apartment building's staircase, appellant, in Jose's presence, removed a loaded gun from appellant's waistband, showed it to Soto, then put the gun back. At some point, the three decided to go to a local park. About 5:00 p.m., they entered a green Honda and went to the area of Kester and Vanowen. Jose was the driver, Soto was the front seat passenger, and appellant was in the back seat.

About 5:00 p.m., Maria Alcarez (Maria), Juan Alcarez (Juan), and Manual Lopez (the decedent) were waiting at a bus stop at Kester and Vanowen. Maria was Juan's sister, and Lopez was Maria's boyfriend. The bus stop was in front of a parking lot. Juan temporarily left.

Jose, driving the Honda, stopped at a red light at the above intersection. Jose and Soto stared angrily at Maria and Lopez, and said things to them. Maria testified that Jose was making hand gestures and "throwing [his] hands out." Lopez looked at Jose and Soto with a puzzled expression. Jose asked Lopez what he was looking at, and Lopez indicated he was not looking at anything. Soto testified that Jose and Lopez were "[m]ad-dogging" each other. When the light turned green, Jose drove into the parking lot

[1] Jose is not a party to this appeal.

and parked. Appellant, Jose, and Soto exited the car and approached Lopez. Juan returned.

Jose asked Lopez what he was looking at, and Lopez replied he was not looking at Jose. Jose asked Lopez where he was from, and Lopez replied he was from nowhere. At some point, Jose called Lopez a bitch, and said to Lopez, "Pico Nuevo Gang." Jose and Lopez argued, appellant punched Lopez in the face, then appellant, Jose, and Soto began hitting Lopez while Lopez defended himself.

During the fight, Lopez punched appellant in the face. Appellant told Jose and Soto to get out of the way. Soto testified that appellant took out the previously mentioned gun and shot Lopez. Lopez fell, mortally wounded by a gunshot to his chest and abdomen. Appellant, Jose, and Soto fled to the Honda and drove away. A woman gave Maria the license plate number of the Honda and the information was relayed to police. Police broadcast a suspect and vehicle description.

A few minutes after the broadcast, police saw the Honda containing appellant, Soto, and Jose at Woodman and Vanowen, and police pursued the Honda. The pursuit lasted about an hour and a half and apparently was broadcast on television. During the pursuit, appellant and Jose waved to bystanders, and appellant, Jose, and Soto "flipp[ed] . . . off" the police and threw gang signs.

At one point during the pursuit, Jose stopped the Honda and appellant exited. Soto testified appellant exited "[t]o get rid of the gun, to go away. I don't know." Appellant fled on foot. Police saw appellant pull out a gun and toss it into a trash can in a park while he was running. Police detained appellant and recovered the gun from the trash can. Other police continued the pursuit of Jose and Soto in the Honda until it crashed.

Maria identified appellant at the trial as one of the assailants of Lopez, and she identified the Honda. On April 16, 2007, Juan identified appellant from a photographic lineup. Juan also identified appellant at the preliminary hearing and at the trial, and identified the Honda at the trial. During the prosecutor's direct examination of Juan, the prosecutor referred to photographic lineups containing photographs depicting appellant and Jose. The following then occurred: "Q Neither of those two guys you were saying

was the shooter; is that correct? [¶] A Yeah, that's correct. [¶] Q Or you didn't know, or could you tell? [¶] A I didn't know." Juan also testified that he did not know which of the two, appellant or Jose, was the shooter. Juan testified that Soto was not the shooter.

CONTENTIONS

Appellant claims (1) the prosecutor committed misconduct by impermissibly making gang references during opening statement and eliciting gang testimony, (2) the trial court erred by admitting autopsy photographs into evidence, (3) the record on appeal is incomplete, and (4) insufficient evidence supports his conviction.

DISCUSSION

1. *No Prosecutorial Misconduct Occurred.*

a. *Pertinent Facts.*

At trial, and prior to opening statements, Jose raised an issue concerning gang evidence as follows. Jose indicated the People would not be introducing gang expert testimony. Jose vaguely suggested the People were precluded from introducing gang evidence at the trial because it had been determined at the preliminary hearing that gangs were not an issue. The following then occurred: "[Jose's Counsel:] But what I am saying is this, your Honor. If they are going to talk about it, it is just going to be cursory from the witness. We are not going to have any kind of longwinded discussion about gang and gang issue in this case. [¶] The Court: Okay. Just the mention of the fact that they mention the words 'Pico Nuevo' or uttered and what the witness understood that to mean and the fact that it is a gang. That's all that is going to come out. [¶] Do you intend to get any further than that?" (*Sic*.)

During later discussions with the prosecutor, the court indicated that Jose's counsel understood the gang issue would come up and that "that is part of the crime." The court asked the prosecutor if he intended to introduce other gang membership evidence. The prosecutor replied, "I don't think that we have to at this point. Other than just what Mr. Soto is going to describe as what he knew 'Pico Nuevo' to be. What it meant to these guys or whatever and that's it." The court asked Jose's counsel if he was

satisfied, and he replied, "[f]air enough." The court asked if that put the issues of Jose's counsel to rest, and Jose's counsel replied yes. Appellant made no comment or objection during the above discussions.

Appellant complains about the following gang references. First, during opening statement, the prosecutor stated, "[Soto] will also tell you that these two defendants, Jose and [appellant], were part of a gang that was pretty much in downtown L.A., but they were trying to start up their own clique up in the valley and this is a clique called -- or gang called Pico Nuevo." Appellant then posed an unspecified objection which the court sustained. Appellant did not request a jury admonition.[2]

Second, during the prosecutor's direct examination of Maria, she testified the Honda pulled into a parking stall. The prosecutor asked what happened next. Maria testified three men approached Lopez and asked him what he was looking at, Lopez replied he was not looking at them, they asked where Lopez was from, and he replied from nowhere. Maria then testified without objection that "then from there they said something. I can't really catch what they said, but in the end, it said gang."

Third, later during the prosecutor's direct examination, Maria testified the three men approached Maria and Lopez, and one of the three, other than Soto, asked Lopez where he was from. Lopez replied he was not from anywhere. The following then occurred: "[The Prosecutor:] Q And you heard something, that same speaker say something about a gang; is that correct? [¶] A Yes."

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[2] During appellant's opening statement, appellant's counsel stated, "I believe that the evidence is going to show a young man talking and drinking, smoking a cigarette earlier in the day, one of them may have shown a pistol or a gun that was at home. When they left, unbeknownst to the two of them, one of them took the gun with him, not with any intent to shoot somebody, but an intent to protect himself if he was attacked by any gang kids. [¶] I think the evidence will indicate the reality that there are gang kids out there looking for other gang kids." As respondent correctly notes, appellant not only misquotes the above statement but erroneously attributes the misquoted statement to the prosecutor as a basis for arguing the prosecutor committed misconduct. Since appellant's counsel, not the prosecutor, made the above quoted statements, there is no need to address them further.

Fourth, the following later occurred without objection: "[The Prosecutor:] Q Now, when these questions are asked, what's the next thing that happens, after they said something about a gang? [¶] [Maria:] A After they said about a gang, . . . one of them said, . . . 'Oh, you're a little bitch,' and [Lopez] said, 'I'm not a little bitch,' and that's when they started fighting."

Fifth, during the prosecutor's direct examination of Juan, he testified without objection that he had known Lopez for 11 years, Lopez was not in a gang, and on April 15, 2007, Lopez was not in a gang.

Sixth, during the prosecutor's direct examination of Los Angeles Police Officer James Norton (a police officer who participated in the pursuit of the Honda), the prosecutor asked if Norton saw anyone in the Honda turn in Norton's direction and make obscene gestures in his direction. Norton replied, "[j]ust the rear passenger mostly." The following then occurred without objection: "Q What was he doing? [¶] A Giving us finger, obscene gestures, gang signs that I could see. He was just flashing things with his fingers."

Seventh, during the prosecutor's direct examination of Soto, the prosecutor elicited testimony from Soto concerning his familiarity with appellant and Jose. Soto testified without objection as follows. Soto, appellant, and Jose were friends. The three were not in the same gang. On April 15, 2007, Soto was in the 17th Street gang, which was a gang located in the west side of Los Angeles. Appellant and Jose had claimed the Pico Nuevo gang to Soto. The Pico Nuevo gang was located in southeast Los Angeles. The apartment of appellant and Jose was near Vanowen and Haskell. Shortly after the above testimony, the prosecutor asked Soto ". . . did you know if the defendants were part of a clique in the valley, or how did you know -- [.]" Appellant interrupted with an unspecified objection which the court sustained.[3]

[3] Appellant claims Soto testified regarding appellant's gang status at page 935 of the reporter's transcript. There is no such testimony on that page.

Eighth, during the prosecutor's direct examination of Los Angeles Police Sergeant Andrew Kukla (another officer who participated in the pursuit), the prosecutor asked if Kukla had an opportunity to observe the conduct or gestures, if any, of the three occupants. Kukla replied yes. The prosecutor asked what conduct Kukla observed, and Kukla testified without objection that numerous times during the pursuit, he saw all three occupants "flipping us off, mouthing the word 'fuck you' to us, and then also making what, in my training and experience, have been known to be gang signs with their hands."

Ninth, Kukla later testified that residents exited their homes to watch the pursuit. The prosecutor asked Kukla if the car's occupants were gesturing towards the crowds or the persons watching the pursuit. Kukla replied, "they were flashing gang signs. The neighborhoods that I described earlier are different gangs. The one in North Hollywood is one gang, and then when you get into Van Nuys, it's another gang. As they circled through those neighborhoods, and they were flashing gang signs back to or out to the crowd of people that were outside." (*Sic*.)

b. *Analysis.*

Appellant in essence claims "[t]he prosecutor and defense attorney agreed during a discussion with the court that no references would be made during the trial to a Pico Nuevo gang" and "[t]he prosecutor was precluded at the preliminary hearing from introducing gang issues because it was determined to be a non-issue"; therefore, the gang references in our above recitation of the pertinent facts constituted prosecutorial misconduct. We reject the claim.

First, there was no agreement between the prosecutor and appellant's attorney that no references would be made to the Pico Nuevo gang during trial. Prior to the opening statements, Jose's counsel, the prosecutor, and the court discussed the issue of gang references as previously noted, but appellant's counsel did not participate in those discussions or offer any comment on the issue of gang references.

Second, there was no agreement between the prosecutor and Jose's counsel that no references would be made to the Pico Nuevo gang during trial. Jose's counsel

acknowledged the prosecutor might introduce gang evidence, and Jose's counsel asked that such evidence be cursory and not long-winded.

The court later commented that "all that is going to come out" was certain specified gang matters, but it is not clear from those comments that the court was ruling on the permissible scope of opening statements or the admissibility of evidence, as opposed to merely reciting the court's understanding of the limits of the prosecutor's proffer to that point. We note the trial court subsequently asked the prosecutor, "[d]o you intend to get any further than that?" and asked if the prosecutor intended to introduce other gang membership evidence.

Jose's counsel did not dispute the trial court's statement that Jose's counsel understood that the gang issue would come up and that "that is part of the crime." The prosecutor later stated, "I don't *think* that we have to [introduce other gang membership evidence] *at this point*[,]" (italics added) then observed he might elicit certain gang testimony from Soto. Jose's counsel indicated the prior comments by the prosecutor put the issues of Jose's counsel to rest, and Jose's counsel did not subsequently request explicit rulings by the trial court on these issues.

Third, the burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant has failed to demonstrate from the record that a determination was made at the preliminary hearing that gang references would not occur at the trial. Fourth, he has failed to cite any authority holding that any such determination would have been binding on the trial court in any event. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the *trial court* on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548, italics added.)

Appellant has failed to demonstrate that there was an agreement that there would be no references to the Pico Nuevo gang during trial, or that a preliminary hearing determination was made that gang references would not occur at trial; a fortiori, appellant

has failed to demonstrate that the prosecutor committed misconduct by violating any such agreement or by acting contrary to any such determination.

Moreover, leaving aside the alleged agreement and preliminary hearing determination, we conclude, for the reasons discussed below, that any issue of prosecutorial misconduct is not preserved for appellate review and, in any event, no prosecutorial misconduct occurred. " '. . . "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." [Citation.] "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." [Citation.] . . .' [Citation.]" (*People v. Tate* (2010) 49 Cal.4th 635, 687.)

In the present case, the prosecutor made gang references during opening statement, and there were eight other instances of gang references during testimony. Appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition as to any of the nine instances in which gang references occurred. Appellant waived the issue of whether the prosecutor committed misconduct. (Cf. *People v. Salcido* (2008) 44 Cal.4th 93, 152; *People v. Partida* (2005) 37 Cal.4th 428, 433-435; Evid. Code, § 353.)

Moreover, as to the above enumerated second, sixth, eighth, and ninth instances of gang references, the prosecutor's question did not expressly refer to a gang, only the witness's answer did. Appellant does not expressly claim that said gang testimony was inadmissible, except on the grounds it was agreed there would be no gang references at trial and a determination was made at the preliminary hearing that no such references would occur at trial, and we have rejected those grounds. We have considered the gang references during the prosecutor's opening statement and during the testimony, both individually and collectively, and conclude the prosecutor did not use deceptive or

reprehensible methods to persuade the jury, and no such methods infected the trial with such unfairness as to make the resulting convictions a denial of due process.

2. *The Autopsy Photographs Were Properly Admitted in Evidence.*

Autopsy photographs of Lopez (People's exhibit Nos. 12, 13, and 14) were admitted in evidence at trial without objection. Appellant claims they were irrelevant and their probative value was outweighed by their prejudicial effect; therefore, their admission in evidence was error violative of his constitutional right to a fair trial. He also claims he received ineffective assistance of counsel as a result of his trial counsel's failure to object to the admission in evidence of said photographs. We disagree.

In *People v. Watson* (2008) 43 Cal.4th 652 (*Watson*), our Supreme Court, similarly faced with the issue of the admissibility of autopsy photographs, stated, " '[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . .' (Evid. Code, § 352.) 'The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors.' [Citation.] We review the trial court's ruling under Evidence Code section 352 for abuse of discretion [citation], and a reviewing court will reverse a trial court's exercise of discretion to admit . . . autopsy photographs only when 'the probative value of the photographs clearly is outweighed by their prejudicial effect.' [Citation.]" (*Watson*, at pp. 683-684.)

Watson continued, "[w]e have viewed the photographs contained in [three specified] exhibits . . . and conclude they are highly probative of motive, intent, and the cause and manner of death. Although unpleasant, they depict the nature of the crime without unnecessarily playing upon the jurors' emotions. [Citation.] The probative value of the photographs thus is not clearly outweighed by their prejudicial effect. [¶] In addition, the photographs were not made inadmissible by the prosecutor's ability to prove motive, intent, and cause of death through other evidence. (See *People v. Gurule* (2002) 28 Cal.4th 557, 624 . . . ['[P]rosecutors, it must be remembered, are not obliged to prove

their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.'].) Furthermore, autopsy . . . photographs are not made inadmissible because they are offered to prove an issue not in dispute [citation], and are admissible even if repetitive of other evidence, provided their probative value is not substantially outweighed by their prejudicial effect, as we have determined is true here [citations]." (*Watson*, *supra*, 43 Cal.4th at p. 684, first bracketed material added.)

We have reviewed the autopsy photographs admitted in evidence. *Watson's* analysis is equally applicable here and compels rejection of appellant's evidence admissibility claim regarding the autopsy photographs. (*Watson*, *supra*, 43 Cal.4th at pp. 682-684.) Moreover, the record sheds no light on why counsel failed to object to the autopsy photographs, counsel did not fail to provide an explanation after being asked to provide one, and we cannot say there simply could have been no satisfactory explanation. Appellant's ineffective assistance contention must be rejected. (Cf. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

3. *The Record on Appeal Is Complete.*

Appellant confusingly and perfunctorily claims "[i]f error in instructions is claimed, the statement or transcript must show what instructions were given, at whose request, and what modifications were made. (Cal. Rules of Court, Rule 184(c).). Because no instructions were given regarding admission of evidence at trial, places in tape that were played, diagrams that were drawn on the board, etc., the record of the trial is incomplete and incapable of being re-created due to the significant lapse of time and therefore there is an inadequate record available for appellate review, . . . [¶] Appellant objects to the settled statement and raises the following issues concerning the reporters transcript . . . : [¶] 1. The court played a video of the car crash and indicated the start time, but did not indicate the length, or if the entire clip was played. (RT 1058.) [¶] 2. People's 27 is also a CD that includes clips of news footage, the prosecution sought introduction by marking it, but it is unclear if the clip was played or if the CD went back to the jury room as evidence. (RT 930.)"

We reject appellant's claim and note the following. Notwithstanding appellant's suggestion to the contrary, appellant makes no claim of error regarding jury instructions. There is no California Rules of Court, rule 184(c), and there was no such enumerated rule at the time of the trial. Appellant has failed to identify to what evidence, tape, diagrams, or settled statement he refers. In any event, the record contains jury instructions which were given regarding the admission of various kinds of evidence at trial. The burden is on appellant to demonstrate error from the record (*In re Kathy P., supra*, 25 Cal.3d at p. 102; *People v. Garcia, supra,* 195 Cal.App.3d at p. 198) and, as to the above issues, he has failed to demonstrate from the record the error suggested by his claim.

Moreover, the record reflects that People's exhibit No. 26, which was admitted in evidence, was a CD of news footage. Appellant has failed to demonstrate there was any other video or CD involved in this case; the master index of the reporter's transcript in this case reflects no other CD or video. As to People's exhibit No. 26, during trial, the prosecutor, outside the presence of the jury, indicated the exhibit was a recorded news broadcast containing pursuit footage. The prosecutor also indicated he would play that portion of the tape which was between "4.06" and "5.20," and that the prosecutor would meet and confer with counsel for appellant and Jose to determine when to stop playing the tape. The tape was subsequently played to the jury during Kukla's testimony, and the exhibit was admitted in evidence, without objection. The court told the jury that the video would not be in the jury room during deliberations, and that the jury would have to view the video in open court if they needed to view it during deliberations.

In sum, the record reflects (1) that only a portion of the CD (People's exhibit No. 26) was played, (2) the length of the portion played, and (3) that the CD was not delivered to the jury in the jury room. Moreover, the record reflects People's exhibit No. 27 was a photograph of a park, not a CD. Appellant's claim therefore fails. Finally, we conclude under all the circumstances that appellant has not borne his burden of demonstrating that any omission of a part of the record was substantial or prejudicial, or prevented meaningful appellate review so as to constitute reversible error or a violation of his right to due process. (Cf. *People v. Bills* (1995) 38 Cal.App.4th 953, 958-962.)

4. *Sufficient Evidence Supported Appellant's Convictions.*

Appellant, almost perfunctorily, claims there is insufficient evidence to support his "conviction." He does not expressly identify the conviction to which he refers, but his one-paragraph argument discussing the alleged insufficiency of the evidence relates alleged evidence pertaining to count 1, not count 2. He argues in essence that Soto, who testified appellant was the shooter, was not a believable witness but Juan, who allegedly told police that appellant was not the shooter, was believable.

We reject appellant's sufficiency claim; it amounts to no more than a request that we reweigh the evidence and substitute our judgment for that of the trier of fact. That is not the function of a reviewing court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) There was ample evidence that appellant participated in the attack on Lopez, and personally shot and murdered him. Appellant does not expressly dispute that there was sufficient evidence that he committed the offense of which he was convicted on count 2. That offense evidenced appellant's consciousness of guilt as to the murder of Lopez. In light of the totality of the evidence presented at the trial, there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed the offenses of which he was convicted on counts 1 and 2. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.